No. 90-970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LECHMERE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board ("Board"), related developments under the National Labor Relations Act, and to provide support to employer interests on those issues that affect a broad section of industry. COLLE's participation in the Petition stage of this case reflects its concerns for the failure of the Board, as affirmed by the court below, to follow the precedent of this Court and of the failure to apply proper principles with respect to property rights. COLLE's continued participation recognizes the need for setting forth a specific legal test to apply in cases in which a labor organization demands access to an employer's property

Further interests of *amicus* are set out in the COLLE's prior brief *amicus curiae*.

ISSUES PRESENTED

Whether the correct legal test to determine when a union in an organizational drive may have access to an employer's property

turns on whether the union has any other objective means in which to reach the targeted employer's workers with its message; not whether the other means of communication available to the union are, have been or may be less effective than physical intrusion upon employer property.

Whether the test outlined above is consistent with the accommodation applied by the Court in the *Scott Hudgens* balancing approach, ostensibly followed by the Board in its new *Jean Country* test.

SUMMARY OF ARGUMENT

The Court's decisions since and including *Babcock & Wilcox*, 351 U.S. 105 (1956), show that in the Court's view, only few situations would demonstrate the necessary inaccessibility to workers that could immunize a trespass onto an employer's property. In each case considering union trespass and property rights, the Court has carefully reasserted an employer's right to impose nondiscriminatory access rules on its property: *NLRB v. Babcock & Wilcox*; *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978).

The issue has always been framed by the Court in terms of the *objective availability* of alternative means of union communication with employees where those employees are physically "inaccessible" to the union. "Inaccessibility" is not met simply because the union has not secured an adequate level of unionization as the Board's result in *Jean Country*, 291 N.L.R.B. No. 4 (1988), purports.

For these reasons, the Court must further define for the Board and the courts below that not only [illegible] forbidden by nonemployees in an organizational campaign, but that "inaccessibility" as used in *Babcock & Wilcox* means physical

inability to reach the workers with its message through any other objective means of communication.

ARGUMENT

THE COURT MUST CLARIFY THE RULE THAT NONEMPLOYEE ACCESS TO EMPLOYER PROPERTY IS NOT AUTHORIZED BY THE NLRA EXCEPT FOR UNION OFFICIALS IN UNIQUE CIRCUMSTANCES BY WHICH ACCESS BECOMES THE RARE EXCEPTION TO THE RULE

It is the position of *amicus curiae* that the Court generally settled the issue of labor union access in *Babcock & Wilcox*, 351 U.S. 105 (1956). Under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, individual workers have the right to choose or refrain from enjoying collective representation. Derivative of this personal right is the right to organize. Yet, the derivative nature of that right has limitations. The proper nonemployee access test may be formulated as follows:

> Nonemployee union members shall have no right of access to an employer's property unless the union can prove by objective evidence that it lacks means available to communicate with employees because they work or live at locations inaccessible to the activist union members.

This test derives its essence from several cases already decided by the Court: *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Taggart v. Weinacker', Inc.*, 397 U.S. 223 (1970), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978).

Amicus demonstrates below how each aspect of this test is supported by the Court's precedent and common sense logic.

A. THE LINE DRAWN FOR APPLYING NONEMPLOYEE ACCESS TO AN EMPLOYER'S PROPERTY MUST BE SET IN CIRCUMSTANCES WHERE A LABOR ORGANIZATION ESTABLISHES IT HAS NO OTHER PHYSICAL MEANS TO REACH THE TARGETED WORKERS

An employer's interest in preserving its property for an exclusive use was first protected from the Board's authority in *Babcock & Wilcox Co. v. NLRB, supra*. There, as in the case at bar, non-employee organizers were permitted by the Board to engage in activities upon the employer's property, even in the face of a nondiscriminatory no solicitation policy. *Id.* at 107. It was the Board's position that unless access was ordered, "union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. The Court rejected this position. It ruled that,

> an employer *may validly post his property* against nonemployee distribution of union literature *if reasonable efforts by the union through other available channels of communication will enable it to reach the employees* with its message and if the employer's notice or order does not discriminate against the union by allowing other distributions.

Id. at 112 (emphasis added).

The possibility of access was left open by the Court only "when the inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels...." *Id.* Those "usual channels" were set out by the Court in footnote 1 of its opinion. The Court expected these efforts to include distribution of union literature, use of the mails, talking to employees "on the streets," driving to their homes, and talking with them over the telephone.

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), reinforces this principle. That case involved the consolidation of two fact patterns. Republic Aviation had banned wearing of union insignia by its employees; the Le Tourneau Company had disciplined employees for distributing union literature in the company's parking lots. The Board had found and the Court agreed that the employers could not "enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property." 324 U.S. at 802 n.8. This case establishes that an employer may not restrict the activities of its own workers' union related activities on its property while they are not working, but properly on its property.[1]

Amicus finds essential to the Court's discussion of *Republic Aviation*, the Court's response to the employers' argument that their non-solicitation rules did not interfere with or specifically discourage union organization and therefore access must be denied. The Court explained that the neutrality of the rule they were advancing was not determinative in their situations since off property activity was not in issue.

> Neither in the Republic nor the Le Tourneau cases can it properly be said that there was evidence or a finding that *the plant's physical location made solicitation away from company property ineffective* to reach prospective union members. Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or *be seriously handicapped*.

324 U.S. at 798 (emphasis added).

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[1] *Also Scott Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (different balance struck when persons are employees already on the employer's property); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571-72 (1978) (explaining distinction).

In this light, *Babcock & Wilcox*, 351 U.S. at 109, recognized that the Board in the Le Tourneau case had properly "balanced the conflicting interests of employees to receive information on self-organization on the company's property from *fellow employees* during nonworking time." However, in *Babcock & Wilcox*, 351 U.S. at 111, the Court also rejected the Board's further assertion for authorizing an invasion: "that nonemployee union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings *to get in touch with the employees*."

The Board's critical deficiency in 1956 was its refusal to "make a distinction between rules of law applicable to employees and those applicable to nonemployees...no such obligation is owed nonemployee organizers. Their access to company property *is governed by a different consideration*." *Babcock & Wilcox*, 351 U.S. at 113. Nonemployee access, then, turns upon whether,

> the *location* of a plant and the living *quarters* of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.

Id.

Therefore, when a union has at its disposal the use of these open methods of communications "to reach the employees with its message," 351 U.S. at 111, it would appear to be clear that in turn, "*[i]n these circumstances*, the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." *Id.* at 112 (emphasis added).

In Petitioner Lechmere's situation, union organizers capably picketed Lechmere's property at times when the employees were proceeding to and from work, became apprised of the addresses of 20% of the workers, acquired telephone numbers, picketed for several months, *and received at least one signed authorization card* from a Lechmere employee. Pet. A-6. Hence, "the usual methods of imparting information [was] available" to the union.

Id. at 113.[2] Moreover, because the union had in fact signed up one worker, that worker had a right to solicit fellow employees on company property during nonworking time under *Republic Aviation; Lechmere's no-solicitation policy only applied to "Non-associates." J.A. 122.* The union plainly had access to Petitioner's property and its methods did clearly reach employees, although not in sufficient numbers to its liking or to the Board's.

B. AN EMPLOYER DOES NOT LOSE ITS RIGHT TO CONTROL THE EXCLUSIVE USE OF ITS PROPERTY WHEN IT ALLOWS THE PROPERTY TO BE USED FOR COMMERCIAL PURPOSES

In *Central Hardware Co. NLRB*, 407 U.S. 539 (1972), the Court found a store surrounded on three sides by a parking lot. Nonemployee union organizers solicited Central's workers on company property. Because of complaints, Central enforced its nonsolicitation rule and at least one organizer was arrested for trespassing. *Id.* at 541. This time, the Board held the company's no solicitation rule was "overly broad." Based upon the Court's decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ("*Logan Valley*"), the Eighth Circuit enforced the Board's Order.

This Court reiterated that in *Babcock & Wilcox*, the Board's imposition of a servitude on the employer's property was an improper exercise of jurisdiction because "the availability of alternative channels of communication made the intrusion on the employer's property rights ordered by the Board unwarranted."

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[2]These alternative means are not unprecedented. Newspapers, radio, and television have been recognized as feasible channels of communication. *Falk Corp.*, 192 N.L.R.B. 716, 721 (1971) (union used handbills, meetings and other methods). Compare *Monogram Models, Inc.*, 192 N.L.R.B. 705, 706 n.5 (1971) (employees not beyond union reach even though plant located along a four lane, 40 m.p.h. road), with the four lane, 50 m.p.h. highway adjacent to Lechmere Plaza. J.A. 114: R. 4-5.

Id. at 544. Furthermore, the accommodation principle articulated in *Babcock & Wilcox* was required "only in the context of an organization campaign." *Id.* at 544-45.

The Board's critical error in *Central Hardware* was finding that because the employer had invited customers to drive onto its parking lots rather than restricting parking lot use to employees only, as had Babcock & Wilcox, this "diluted" the employer's property interest. The Court strongly disagreed that Central's lots had "acquired the characteristics of a public municipal facility": "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Id.* at 547. Since this fact was the only one relied upon by the Board, in misreading *Logan Valley*, the Court found the Board's order "an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* The Court remanded the case for the Board to consider the question whether any reasonable means to communicate with the workers was available "other than solicitation in Central's parking lots." *Id.*

The result in *Central Hardware* compares favorably with the Court's prior action in *Taggart v. Weinacker's*, 397 U.S. 223 (1970). In *Taggart*, a state court in Alabama had issued an injunction prohibiting labor union picketing on the premises and property of a single retail store, its adjacent parking lot, and sidewalk. The picketing was allowed only on adjacent public sidewalks, an entirely proper alternative locus to reach the very same persons. Both employee and nonemployee union picketers were involved. Because of the union's failure to contest the affidavits in support of the employer's charges of obstruction, the writ of certiorari was dismissed, and so the employer's action to enjoin the picketing was sustained.

As set out in the concurrence of Chief Justice Burger in *Taggart*, "[t]he protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of

state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer with the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises." 397 U.S. at 227.[3]

The result in *Taggart* shows that the Court permitted the state court to preserve an employer's property for its lawful business use and to avoid interference with that purpose. This Court has "vigorously and forthrightly rejected" the faulty premise that "people who want to propagandize protests or views have a constitutional right to do so, whenever, however and wherever they please." *Adderly v. Florida*, 385 U.S. 39, 47-48 (1966). Keeping nonemployee union personnel (equally with non-business solicitors) off an employer's property is an appropriate measure to regulate organizational activity reasonably without impairing the union's ability to communicate freely its message to the workers at all other places. The protection of property through common law trespass is a fundamental tenet of American jurisprudence.

A business employer's ownership of property includes the right to control, protect, and defend the boundaries of its possession. *Green v. Biddle*, 21 U.S. 1 (1823) (trespass quare clausum fregit). Its business is itself a property right. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

In the present case, the employer's property interest includes the exclusive use of his property to return an economic profit. The Board's calculus does not consider the financial cost to the property owner by commanding union access. Neither does it consider the confusion caused to the customers who were cultivated by the employer through the expenditure of considerable advertising money. This "volatile influence on certain audiences" of picketing, is the tangible fact that it "involves custom-

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[3]The undersigned attorney for *amicus curiae* COLLE participated in *Taggart v. Weinacker's, Inc.;*, *Lloyd Corp., Ltd. v. Tanner; Central Hardware Co. v. NLRB*; and *Scott Hudgens v. NLRB*.

ers annoyance and a consequent loss of sales for management," Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 Minn. L. Rev. 505, 507-08 (1965), and other expenses, *e.g.*, security, littering, maintenance, accident liability, and added insurance costs.

Just like the Postal Service's no solicitation policy at its Post Offices's nationwide, a private employer cannot be spending "considerable time and energy fitting competing demands for space and administering a program of permits and approvals." *United States v. Kokinda*, 110 S. Ct. 3115, 3124 (1990). Such considerable expense and regulation the Board would, by its order alone, compel all employers to endure without compensation. Preserving private property for the special use to which it has been dedicated has been protected by the Court.

In Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983), a non-certified union sought to use the internal school mail system. Access was denied by the Court because the union held no bargaining *status*, but also because the Court ruled the union's access was incompatible with the use of the school's property: "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* at 49. In fact, the Court confirmed that "alternate modes of access" were available to the union there, such as off-premises rallies and the media. *Id.* at 53-54.[4]

The public frequents retail establishments because of the substantial investment made to gain their patronage. The patrons believe that through the expenditure of considerable money and

[4]Inasmuch as a non-public forum requires scrutiny under the First Amendment and private property does not, the latter owner would be accorded greater protection "to preserve the property under its control for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 46. *See also* 460 U.S. at 51 n.11, professing that an employer's exclusive property access rule for its certified union only is proper under the NLRA and, concomitantly suggesting, exclusionary access rules for stranger unions not improper under the NLRA.

effort, the establishment is a comfortable and convenient place to shop. If upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses or "run the gauntlet of most uncomfortable publicity, aggressive, and annoying importunity," *Truax*, 257 U.S. at 328, there will be a serious adverse impact on the store's normal sales activities.

Protection and recognition of these economic interests yields additional benefits. Given the virtually unlimited number of union groups, causes, and complaints (from area standards picketing, consumer boycotts, foreign product boycotts, war protests, civil rights protests, raffles, bake sales, J.A. 65-66, etc.) and the potentially divisive and inflammatory effect they would have on the consumer audience upon the employer's business property, the problem of "regulation," even in the "reasonable orders" the Board might possibly promulgate, becomes very serious. While the proposed rule *amicus curiae* advocates would not avoid that problem altogether, the mere fact that it would limit the number of such incursions to circumstances where no reasonable alternatives exist would render the problem manageable. This eliminates the legal hair-splitting and substitutes diversity for clarity.

This accommodation preserves the equal statutory and Constitutional right of the employer to express its views.[5] It also

[5]The First Amendment principle gleaned from the "Live Free or Die" motto of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977), "protects a person who refuses to allow use of his property as a marketplace for the ideas of others." *Id.* This right is extended to corporations as well. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Neither has Congress seen fit to silence employer free speech. *See* 29 U.S.C. § 158(c); *Bellotti*, 435 U.S. at 784-85 (the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak," especially where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing views to the public, the First Amendment is plainly offended.").

ensures "protection of the unwilling listener." *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988) (restriction on residential picketing upheld); *Breard v. City of Alexandria, LA*, 341 U.S. 622, 645 (1951) (community not required by the First Amendment "to admit soliciting of publications to the home premises of its residents"). Personal contact becomes the listener's option, not the speaker's.[6]

In the wake of massive informational and organizational efforts by the union against the Petitioner here, it is plainly obvious that many employees chose to exercise their personal right not to engage in representational activities with the union. Their avoidance of the union's efforts should not become the bootstrap to invoke a statutory right of access to them.[7]

Therefore, First Amendment interests are directly involved where the government "forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." *PruneYard Shopping Center v. Robbins*, 446 U.S. at 74, 98 (1974) (Powell, J.; concurring). This is because the public is likely to become confused by identifying the expression occurring on the property as the view of the owner. "The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 2044, cannot restore his 'right to refrain from speaking at all.'" *Id.* While *amicus* disagrees with the holding in *PruneYard*, that case involved a constitutional issue whereas the issue here is "dependent exclusively" on the NLRA. *Scott Hudgens*, 424 U.S. at 521.

[6]In fact, Lechmere received customer complaints about the union's leafletting on its property. J.A. 71, 96. These complaints cannot be ignored by a business without risking the loss of consumer confidence.

[7]The court of appeals also added that the employer failed to provide the union with the names and addresses of its employees - one more arrow in its appellate quiver. Pet. A-18. In light of the employees' primary interest in his/her name and address, the statement is but a prelude to the next chapter in coercive communications; unions have been filing §§ 8(a)(1) and (3) unfair labor practice charges against employers demanding employee names and addresses as of right, and the Board's General Counsel is waiting for the right case to make this precept law. *See Metro Care Services, Inc.*, 1990 N.L.R.B. GCM LEXIS 68 (Oct. 31, 1990) ("the instant cases do not present an appealing vehicle with which to attempt to extend the *Jean Country* principles to this area."); Pet. B-6 (the Board states: "the effectiveness of the Union's resorting to the Motor Vehicle Registry as a comprehensive source of the names and addresses of the Respondent's employees is patently minimal.").

C. THE PROPOSED BRIGHTLINE TEST TO PROTECT PRIVATE PROPERTY WHERE THE "USUAL MEANS" OF EMPLOYEE COMMUNICATION REMAINS OPEN, REQUIRES THE COURT TO REVISIT ITS RULINGS IN *SCOTT HUDGENS* AND *SEARS ROEBUCK & CO.* AND HARMONIZE THESE AUTHORITIES

In both *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), the Court addressed the less central right of unions to engage in area standards picketing on employer property. Considering the historical lessons learned in analyzing the many access cases decided by the Board under the Act, the principles enunciated in these two cases we believe should lead the Court to rethink both its rulings to closely parallel *Babcock & Wilcox*. *See Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970) (new rule adopted in light of subsequent developments).

In *Scott Hudgens*, union picketers were removed from the parking lot and entrances to a shopping mall owned by Hudgens, in which the union had a primary dispute with one store located therein, Butler Shoe Co. The union filed a § 8(a)(1) charge against Hudgens. The Board found an unfair labor practice because members of the public were invited to do business within the mall and therefore it was "immaterial whether or not there existed alternative means of communicating with the customers and employees of the Butler store." *Id.* at 511. Demonstrating that unlike *Babcock & Wilcox* and *Central Hardware*, the activity in Hudgens involved "economic strike activity" carried out by Butler's own workers, but trespassing upon the property interests

of Hudgens, the Court refused to allow the Board to draw the line upon the existence alone of section 7 activity. The Court explained it had drawn a point "along the spectrum" between the LMRA right and the private property right, as setting forth a proper intellectual construct for an inquiry accommodating section 7 and the property rights.[8]

In Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters, 436 U.S. 180 (1978), the Court upheld state court jurisdiction to enjoin the trespass by union area standards picketers upon employer property. In that case, the Court reviewed its *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware* decisions in reexplaining that the union shoulders a "heavy" burden in showing lack of alternative means to communicate with employees and that "*trespassory organizational activity*" should rarely be allowed. *Sears*, 436 U.S. at 205 (emphasis added).[9]

The Court also noted that access "has generally been denied except in cases involving *unique obstacles* to nontrespassory methods of communication with the employees," *Id.* at 205 n.41 (emphasis added), and that "[o]f course, if Sears had initiated the proceeding before the Board, the *location* of the picketing would have been entirely *irrelevant* and *no question of accommodation* would have arisen." *Id.* at 201 n.32 (emphasis added).

On its face, the Court's interpretation of the employer's right to protect its property by keeping off area standards picketers

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[8]The accommodation reached by the Court in *Scott Hudgens* did not involve total strangers to Butler Shoe Co., since the economic picketers were from Butler's manufacturing operations rather than the sales store. Therefore, the accommodation made by the Court did not give the Board the green light to apply the "spectrum" analysis to cases involving complete stranger activities.

[9]*See e.g., NLRB v. Kutsher's Hotel & Country Club, Inc.*, 427 F.2d 200, 202 (2d Cir. 1970); *May Dep't Stores Co. v. NLRB*, 316 F.2d 797, 800 (6th Cir. 1963). Frequently, area standards picketing is simply another available means to organize non-union employer's, which the above quoted language recognizes.

and even non-employee organizers, is totally inconsistent with the Board's *Jean County* jurisprudence set forth correctly by Petitioner.[10] Since nonemployee labor pickets cannot trespass, and given that the nonemployee pickets could communicate through picketing on nearby public property, the *Sears* Court ruled no accommodation was necessary.

However, the Court's endeavor to assure that the lack of federal preemption in *Sears* did not completely rule out Board participation in these cases if its jurisdiction were to be invoked by a party, led the Court to reclaim the fundamental difference between the right to organize to be a "core" right whereas area standards picketing was a right, but a lesser one. *Sears*, 436 U.S. at 206 n.42.

Although we perceive that the Court did not intend to establish two balancing tests, *i.e.*, one access rule for organizational picketing and one for area standards picketing, the Board always treats both rights as superior to private property rights inasmuch as the Court indicated that union rights lay upon the "spectrum" indicated in *Scott Hudgens*. Consequently, in every known case, an employer's property right yielded to union access under *Jean Country*, except in three cases where the union interest was entirely remote, *Federated Dep't Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. (BNA) 1362 (1989) (no access where union attempts area standards pickets after the store is built); *Hardees Food Systems*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989) (no access where union has no Section 7 interest at all), or the union wants to block customer access, *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989) (with a dissent arguing for full access, on one store-one lot situation, union could not picket directly in front of store door, but could in the parking lot).

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[10]The Court in *Sears*, explained that "in deciding the unfair labor practice question, the Board's *sole* concern would have been the objective, *not the location*, of the challenged picketing." 436 U.S. at 200 n.31 (emphasis added).

Amicus believes that in establishing a distinction in *Babcock & Wilcox* for nonmember organizers to gain access if alternate means of communication were not "available," the Court did not condone a separate rule for area standards picketers, which could allow greater access although they were engaging in a less-central right with "no such vital link to the employees located on the employer's property." *Sears*, 436 U.S. at 206 n.42. The rule attending each form of informational activity under the Act should be identical and uniform in both form and focus.

If nonemployee picketers cannot have property access in the organizational drive under *Babcock & Wilcox*, they should not be granted access when engaging in area standards picketing as well. The Board has proceeded repeatedly to the contrary.[11]

[11]*Sentry Markets, Inc. v. NLRB*, 914 F.2d 113 (7th Cir. 1990) (grocery store owner enjoined from removing economic boycott handbillers of one product from its property); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) (economic strike picketing on 14th floor of office building necessary against third party property owner because union alleged it could not as effectively communicate outside of building entrance); *Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989) (union agent testifies that area standards picketing at perimeter less effective then at the front door); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325, 1327 (1989) (ULP picketing at edge of parking lot not "reasonable effective alternative means of communication"); *Dolgin's*, 293 N.L.R.B. No. 102, 2131 L.R.R.M. (BNA) 1159, 1162 (1989) (area standards handbilling ordered on company property because union could not distinguish between customers, "thereby reducing the effectiveness of the handbilling"); *Mountain Country Food Store*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329, 1330 (1989) (shopping center with three shops - because union product boycott message could not fit on one picket sign, picketing at parking lot entrance held "ineffective"); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331, 1333 (1989) (where nondiscriminatory access rule enforced by third party property owner - area standards picketing at lot entrance found "generally ineffective" because it would "substantially dilute" union message); *Butterfield Theaters*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113, 1116 (1988) (economic strike picketing at parking lot entrance simply "ineffective and/or unsafe").

A close review of the Court's decision in *Scott Hudgens*, reveals two other lines of thought. Returning to the Court's intent in *Babcock & Wilcox*, the Court stated that its holding there that "union organizers who seek to solicit for union membership may intrude on an employer's property if *no alternative means exist* for communicating with the employees." *Scott Hudgens*, 424 U.S. at 511. Focusing on the economic strike activity at hand in *Scott Hudgens* itself, the Court denied enforcement of the Board's order where the union's trespass was to be onto a *third party's property*. Between the results in *Babcock & Wilcox* and *Scott Hudgens*, there is little room for an accommodation except where physical access to workers is "*seriously handicapped*." *Republic Aviation*, 324 U.S. at 798.

Amicus believes that the Court never intended for the Board to have free reign to deny the results reached in the almost identical fact situations presented to the Court through the years.[12] The test for accommodation, then, only arises when workers are physically inaccessible to union organizers.

The Board's analysis here is therefore improper. Its utilization of *Jean Country*, 291 N.L.R.B. No. 4 (1988), taken in issue by all parties throughout these proceedings, is not a permissible test under the NLRA or the restrictions previously carved out in *Babcock & Wilcox* by the Court. Since organizational activity is an integral component of the Board's *Jean Country* test, the Court should note that the misapplication of the Court's tests has disabled employers from protecting their property rights. Like *Boys Market*, economic realities show that the balancing test

[12]In *Southern Servs., Inc.*, 300 N.L.R.B. No. 161, 136 L.R.R.M. (BNA) 1066 (1990), the Board determined that janitorial service workers could engage in organizational activity upon a third party customer's property in the face of the third party's non-solicitation rule. The Board found that *Babcock & Wilcox* was inapplicable and *Republic Aviation* applicable. It ignored the *Scott Hudgens* result that third party organizers and economic picketers have no right of access to property when the union workers had other means of communication. That case highlights the direction the Board intends to take its *Jean Country* case, *see also* footnote 7, *supra* at 12, which is a further reason for the Court's concern.

(like damages in *Boys Market*) must now be reversed. The Court should adopt as the proper test, the following:

> Nonemployee union members shall have no right of access to an employer's property unless the union can demonstrate by objective evidence that it has no means available to communicate with employees because they work or live at locations inaccessible to the activist union members.

CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court reverse the decision of the First Circuit and adopt the legal test enunciated above.

Respectfully submitted,

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